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COURT OF APPEAL, FOURH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re S.O., a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

ALEXIS M.,

Defendant and Appellant.

D070321

(Super. Ct. No. J518774D)

APPEAL from findings and orders of the Superior Court of San Diego County,
Sharon L. Kalemkiarian, Judge. Affirmed.

Cristina Gabrielidis, under appointment by the Court of Appeal, for Defendant and
Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County
Counsel, and Daniela Davidian, Deputy County Counsel, for Plaintiff and Respondent.

Alexis M. appeals an order terminating parental rights to his daughter, S.O., under Welfare and Institutions Code section 366.26.¹ He argues the juvenile court erred when it determined the beneficial parent-child relationship exception did not apply and terminated parental rights. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2014, the San Diego County Health and Human Services Agency filed a petition under section 300, subdivision (f) on behalf of newborn S.O. The petition alleged that S.O.'s mother, Guadalupe O., and her father, Alexis, caused the death of their nine-month-old son, Kevin M., who died in September 2014 from blunt force head trauma.

Guadalupe and Alexis were Kevin's only caregivers. They claimed Kevin was twice left unattended on a bed. The first time he became wedged between the bed and the wall, and the second time he fell from the bed to the floor. Guadalupe and Alexis gave conflicting stories about the circumstances of his fall. Guadalupe admitted she shook Kevin after each incident. Alexis said Kevin was lethargic after the first incident, but they did not seek medical treatment for him.

The San Diego County Coroner ruled that Kevin's death was a homicide. Kevin had multiple impact areas on his head, resulting in several subdural hematomas. The hematomata varied in age from acute to a few weeks old. The district attorney charged Guadalupe with murder and felony assault on a child. Alexis was not charged. He insisted Guadalupe was innocent and Kevin's death was accidental.

¹ All further statutory references are to the Welfare and Institutions Code.

Guadalupe gave birth to S.O. in jail. The Agency detained S.O. in protective custody. The Agency did not consider Alexis for placement because it viewed him as complicit in Kevin's death.

At the jurisdiction hearing, the juvenile court amended the petition by striking the allegation Alexis had caused Kevin's death and adding, "and the father did not intervene when he saw the mother shake the child and did not bring the child in for medical treatment when he saw the child look lethargic." The juvenile court sustained the petition, removed S.O. from the custody of her parents, denied reunification services to Guadalupe and Alexis, and set a section 366.26 hearing.

Alexis filed a writ petition challenging the setting of the section 366.26 hearing and a petition for writ of habeas corpus alleging ineffective assistance of counsel. This court stayed the section 366.26 hearing pending the outcome of the writ proceedings. The petitions were ultimately denied.

The section 366.26 hearing was held on May 13, 2016, 18 months after S.O. was detained in protective custody. The juvenile court received the Agency's reports in evidence and accepted the social worker's stipulation testimony. Alexis testified on his own behalf. He did not cross-examine the social worker. Guadalupe and minor's counsel did not present any affirmative evidence.

The parties stipulated if the social worker were to testify, he would state he was assigned to the case approximately a year earlier. He had numerous opportunities to observe visits between Alexis and S.O. Alexis was always appropriate with his daughter. S.O. smiled at Alexis. Alexis redirected her when necessary.

The social worker reported S.O. was a healthy child, who was developmentally on track. In May 2015, at Alexis's request, the Agency placed S.O. with her current caregivers, who were nonrelative extended family members. The caregivers had nine children ranging in age from nine to 27. They were committed to adopting S.O. In addition, there were 70 San Diego County families that were interested in adopting a child like S.O.

Alexis had a two-hour visit with S.O. at the Family Visitation Center each week. He held S.O., fed her, played with her and changed her diapers. There were no noted concerns about his visits with his daughter. In addition, the caregiver supervised two-hour visits between Alexis and S.O. twice a week. The caregiver did not have any concerns about visitation. Alexis held S.O. and talked to her. When S.O. became fussy, she would reach for her caregiver. Alexis said, "She does not want to be with me." S.O. called her caregivers "mama" and "papa," and was able to name the other members of her household. S.O. was a happy, active, social and cheerful child.

In April 2016, the caregiver reported S.O. cried and held on to her when the visitation monitor arrived to pick her up. This behavior was unusual for S.O. The visitation monitor reported that S.O. slept for the first 40 minutes of the visit. When she awoke, Alexis played with her and fed her. The following week, S.O. displayed the same anxiety when leaving the caregiver. However, the visit went well. S.O. babbled at Alexis throughout the visit. He followed her as she wandered through the visitation center, playing with the toys she wanted to play with. Alexis cradled S.O. during part of the visit.

The social worker believed Alexis was not protective of S.O. and continued to place Guadalupe's needs above S.O.'s safety. Alexis expressed concern that Guadalupe was not able to visit with S.O. The social worker said termination of parental rights would not be detrimental to S.O. She was in a safe and loving home that provided her with stability, love and security. S.O. was a healthy and loving child.

Alexis testified S.O. was bonded with him and loved him. When she walked away from him she would look back to make sure he was following her. She smiled at him and laughed with him. When S.O. wanted something she could not reach, she would take him by the hand to help her get it.

The juvenile court found that S.O. was adoptable. The court found that Alexis consistently visited S.O. and the visits were pleasant. The evidence showed she saw her caregivers as her mother and father. While Alexis's relationship with S.O. was "pleasant and kind and consistent" it did not outweigh the importance to S.O of having a safe, permanent adoptive home. Citing *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576 (*Autumn H.*), the juvenile court found that Alexis did not meet his burden to show that S.O. would benefit more from continuing their relationship than she would from adoption. The juvenile court terminated parental rights and designated the caregivers as S.O.'s prospective adoptive parents.

DISCUSSION

A

The Parties' Contentions

Alexis contends the juvenile court erred when it determined the beneficial parent-child relationship exception did not apply. He argues he proved both elements of section 366.26, subdivision (c)(1)(B)(i) by maintaining regular visitation and contact with his daughter and showing she would benefit from continuing her relationship with him.

The Agency acknowledges Alexis maintained regular contact and visitation with S.O., but argues their relationship, while pleasant and friendly, did not evince a significant parent-child bond. The Agency argues to the extent, if any, S.O. had a substantial, positive emotional attachment to her father, her need for a secure, safe and loving permanent home outweighed any benefit she would gain from continuing the parent-child relationship.

B

Legal Principles and Standard of Review

At a permanency planning hearing, the court may order one of three alternatives—adoption, guardianship or long-term foster care. (*In re S.B.* (2008) 164 Cal.App.4th 289, 296-297.) If a child is adoptable, there is a strong preference for adoption over the alternative permanency plans. (*Id.* at p. 297; *San Diego County Dept. of Social Services v. Superior Court* (1996) 13 Cal.4th 882, 888.) If the court determines that a child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in

section 366.26, subdivision (c)(1). (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.) An exception to termination of parental rights applies where "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) "Evidence of 'frequent and loving contact' is not sufficient to establish the existence of a beneficial parental relationship." (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1315-1316.) " '[B]enefit from continuing the . . . relationship' " means the parent-child relationship "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) "If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid.*)

"We apply the substantial evidence standard of review to the factual issue of the existence of a beneficial parental relationship, and the abuse of discretion standard to the determination of whether there is a compelling reason for finding that termination would be detrimental to the child."² (*In re Anthony B., supra*, 239 Cal.App.4th at p. 395.)

² Alexis argues the language "whether there is a compelling reason for finding that termination would be detrimental to the child" (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 395) imposes a "third prong" on review. Under long-standing principles set forth in *Autumn H., supra*, 27 Cal.App.4th at p. 575, the juvenile court's finding "the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed" constitutes a compelling reason for finding that termination would be detrimental to the child. This is not a third prong. It is a balancing test to determine whether the parent has met the second "benefit" prong

The Beneficial Parent-Child Relationship Exception Does Not Apply

S.O. was detained in protective custody at birth because her mother, actively, and her father, passively, caused the death of their nine-month-old son. Because those circumstances presented a substantial and serious risk to S.O.'s safety, the juvenile court denied reunification services to the parents and set a section 366.26 hearing. S.O. never lived with Alexis.

During the first six months of the proceedings, Alexis had a weekly two-hour supervised visit with S.O. The record shows he attended all visits with S.O. except those cancelled by her caregivers. When S.O. was placed with her current caregivers, they supervised two additional visits a week. By all accounts, Alexis was appropriate with S.O. He fed her, played with her, changed her diaper, and told S.O. he loved her. S.O. engaged with Alexis. The juvenile court found that their relationship was "pleasant and kind and consistent."

Alexis relies on those facts to argue he proved the statutory elements of section 366.26, subdivision (c)(1)(B)(i) and therefore the juvenile court erred by not applying the beneficial parent-child relationship exception to termination of parental rights. However, the "benefit" prong of section 366.26, subdivision (c)(1)(B)(i) requires the assessment the parent-child relationship would "promote[] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home

of section 366.26, subdivision (c)(1)(B)(i). If the juvenile court determines the parent has met his or her burden to do so, this circumstance or any of the other circumstances described in section 366.26, subdivision (c)(1)(B), by statutory definition, constitute a compelling reason to determine termination would be detrimental to the child. (*Ibid.*)

with new, adoptive parents." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) In his argument, Alexis does not address this long-standing principle of California law.

The record supports the conclusion S.O. would derive more benefit from adoption than from maintaining her relationship with her father. Noting their limited contact, the social worker believed S.O. viewed Alexis as a friendly visitor or a nonparent relative, not as a parent. Alexis did not put S.O. to bed at night. He did not bathe her. He was not responsible for feeding and clothing her, or guiding her upbringing. To his credit, Alexis did the best he could under the circumstances. However, there is no evidence to show S.O. had a substantial, positive emotional attachment to him. She did not greet Alexis with any display of affection. S.O. was not distressed when visits ended. She easily transitioned away from him. By contrast, S.O. exhibited attachment to her maternal caregiver by holding onto her and crying before leaving for a visit with Alexis. When S.O. became fussy, Alexis would give her to the caregiver, saying S.O. preferred her.

When a child is adoptable, there is a strong preference for adoption over less secure and stable permanent plans. (*In re J.C.* (2014) 226 Cal.App.4th 503,528; *Jones T. v. Superior Court* (1989) 215 Cal.App.3d 240, 251.) At the time of the section 366.26 hearing, S.O. was 18 months old. She had spent her entire life in foster care, and had lived with her caregivers since she was six months old. Her caregiver exhibited a maternal instinct with S.O. S.O. called her caregivers "mama" and "papa." The juvenile court found that S.O. clearly viewed her caregivers as her parents. She was happy, active, social and cheerful in their care. We conclude the juvenile court did not err in determining S.O. would greatly benefit from the security of a stable, permanent home

with committed, capable adoptive parents. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

Thus, the record supports the finding S.O. will not be greatly harmed by termination of parental rights. (§ 366.26, subd. (c)(1)(B)(i); *Autumn H.*, at p. 575.)

DISPOSITION

The findings and orders terminating parental rights are affirmed.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

AARON, J.